

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3 CARL WILSON,

4 Plaintiff,

5 -vs-

6 HARPERCOLLINS  
PUBLISHERS, et al,

7 Defendants. )

FILED  
UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO  
95 NOV -8 AM 11:02

No. CIV-94-892-JC  
CLERK-ALBUQUERQUE

8 The above entitled matter came on to be heard  
9 on the 3rd day of October, 1995, beginning at the hour  
10 of 1:45 o'clock p.m. at the United States Courthouse,  
11 Albuquerque, New Mexico, before the Honorable John E. Conway,  
12 Chief United States District Judge.

\* \* \*

AFTERNOON SESSION

OCTOBER 3, 1995

1:45 P.M.

THE COURT: All right, the next matter is Carl Wilson versus HarperCollins Publishers, Civil Cause 94-892-JC. All right, this is before me on an application for acceptance of filing under seal.

So I take it that you wish to file Doctor O'Connell's report as a sealed document?

MR. ROMERO: Good afternoon, Your Honor. I'm Ernesto Romero, local counsel appearing for Barry Landberg, the lead counsel for plaintiffs.

If it please the Court, Exhibit 2 to the application is an order which was entered in the California conservatorship case in the Superior Court of Los Angeles, which requires the plaintiffs to obtain conditional authority to file the information contained in Doctor Garrett O'Connell's report in this matter, but under seal.

Mr. Landberg and his firm were counsel representing members of the Wilson family in that case. And as a consequence, it was necessary in order to comply with that order to make a request to this Court that Mr. Landberg's declaration, which references Doctor Garrett O'Connell's report, be tendered under seal.

1 I'm not asking the Court, nor does the application  
2 recite that the initial sealing order from the California  
3 Superior Court in the conservatorship application filed in  
4 February of '92 or the order that I just made reference to be  
5 filed under seal.

6 This is in a sense a prefunctory request in order to  
7 comply with the instructions given by the California court. And  
8 having made that request, we believe that we've performed the  
9 duty imposed by the Court order and the request as made.

10 THE COURT: Well, you gave Mr. Dixon a copy of the  
11 report, right?

12 MR. ROMERO: Yes, Your Honor. Mr. Dixon's --

13 THE COURT: So all you're talking about is you don't  
14 want the public to know what's in this, right?

15 MR. ROMERO: In the declaration, that's correct.

16 THE COURT: Okay.

17 MR. ROMERO: Mr. Dixon is counsel -- co-counsel, I'm  
18 told, main counsel, has the actual text of the forty-page  
19 report.

20 THE COURT: Okay.

21 MR. ROMERO: So that's it.

22 THE COURT: Okay.

23 MR. DIXON: Your Honor, the issue is not whether the  
24 report will be placed under seal. As I understand it, the  
25 report is not being tendered. What has happened is that

1 Mr. Landberg, the attorney representing the plaintiff in this  
2 case, has submitted his own affidavit as a fact witness, which  
3 is the basis of their opposition to our motion for summary  
4 judgment and has filed that declaration, that affidavit which  
5 contains, among other things, references to conversations he  
6 may have had with Doctor O'Conner, not merely the report.

7 And the fact is, is that Mr. Landberg is asking the  
8 Court to rely on his affidavit in making its decision regarding  
9 summary judgment.

10 The order of the Court, as I read it, the state  
11 court, permits any party, any person who is a witness in the  
12 conservatorship proceeding, from giving -- does not prevent any  
13 witness in the conservatorship proceeding from giving testimony  
14 or giving declarations in other proceedings.

15 That's what this is, a declaration by Mr. Landberg.  
16 Also included in this material they want sealed is a letter  
17 that was sent directly from Mr. Landberg to representatives  
18 from HarperCollins around the time that the book was being  
19 published.

20 That clearly is not something that should be placed  
21 under seal. Moreover, the conservatorship order states clearly  
22 that HarperCollins obtained a copy of Doctor O'Conner's report  
23 through other sources directly.

24 So there's nothing private about this report. And  
25 I think we have to go back to the fundamentals of sealing

1 questions with respect to sealing of discovery materials  
2 as such, which none of this is.

3 The Court is governed by 26-C, but with respect to  
4 documents that are submitted with respect to summary judgment,  
5 either in favor of summary judgment or opposing, the First  
6 Amendment sets forth the test, and it's the same as if the  
7 Court were to decide whether to close the courtroom or not,  
8 because it's the raw materials upon which the Court will  
9 decide -- will make a judicial decision.

10 And the cases are uniform in this -- Rushford  
11 versus New Yorker Magazine, 846 Fed. 2d. 249; Joey versus  
12 North, 2nd Circuit case, 692 Fed. 2d., 880, I have copies of  
13 them.

14 But the analysis that the Court applies is the one  
15 that applies also to closure of a courtroom, which is a drastic  
16 measure, and the proponent has to show a compelling interest  
17 and has to show that it's the most narrowly tailored, and it  
18 has to show that it's effective.

19 THE COURT: Where does your client get this?

20 MR. DIXON: It was obtained in other discovery.  
21 There was a preceding lawsuit, and as I understand it, the  
22 report itself, which is not what they're trying to seal here,  
23 was obtained in connection with that.

24 There's no limitations. We weren't a party to the  
25 conservatorship proceeding. We have it, we can attach it if we

1 want to. There's nothing that prevents us from doing it.

2 The idea that Mr. Landberg can make these statements,  
3 only some of which relate to conversations he had with  
4 Doctor O'Conner, and then try to seal it, which would  
5 presumably -- I'm not sure what that means about our reply  
6 to their memorandum in opposition.

7 It would seem to imply perhaps that we shouldn't  
8 make reference to Mr. Landberg's affidavit to that extent.  
9 That's just not right, and that's --

10 THE COURT: No, I'm not going to permit that. You  
11 can withdraw it if you want to, but I'm not going to have it  
12 filed under seal.

13 They've already got a copy of it, they can  
14 disseminate it to the world.

15 MR. ROMERO: Your Honor, may I -- I take it the Court  
16 is ordering that they not be filed -- not be accepted for  
17 filing under seal, is that correct?

18 THE COURT: Not under seal. I'm giving you an  
19 opportunity to withdraw whatever you filed if you don't  
20 want to --

21 MR. ROMERO: All right. But I still have the  
22 option for filing them not under seal, correct?

23 THE COURT: Yes.

24 MR. ROMERO: Thank you.

25 THE COURT: All right, anything further?

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MR. ROMERO: No, Your Honor.

THE COURT: We'll be in recess.

CLERK: All rise.

(Court adjourned at 1:55 p.m.)

REPORTER'S CERTIFICATE

I, Jerry Martinez, Official Court Reporter for the United States District Court for the District of New Mexico, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth, and I do further certify that the foregoing transcript has been prepared by me or under my direction.

  
JERRY MARTINEZ